No. A-416

IN THE 76-1086

Supreme Court of the United States

OCTOBER TERM, 1976

LOCAL UNION NO. 391, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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v.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Local Union No. 391 petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The Order of the Court of Appeals denying rehearing (App. A[1] pp. 18 - 24) is reported at 543 F.2d 1376. The opinion of the Court of Appeals (App. C. pp. 26 - 33) is reported at 543 F.2d 1373. The Decision and Order of the National Labor Relations Board (App. E pp. 36 - 55) are reported at 208 N.L.R.B. 540.

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1. "App." refers to the appendix to this petition.

JURISDICTION

The Judgment of the Court of Appeals (App. D pp. 34 - 35) was entered on December 6, 1976. Local Union No. 391's Petition for Rehearing was denied on September 8, 1976 (App. B p. 25). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether §§ 7 and 13 of the National Labor Relations Act permit the Board to restrict a Union's strike and picketing activity to one location or division of a corporation by holding that separate locations or divisions of that same corporation are separate "persons" solely for purposes of § 8(b)(4)(B) of the Act, even though for all other purposes the corporation is one "person."

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et seq.*) are as follows:

> Sec. 2. When used in this Act-
> (1) The term "person" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.
>
> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

> Sec. 8 (b) It shall be an unfair labor practice for a labor organization or its agents–
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> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
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> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.
>
> Sec. 10 (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . .
>
> Sec. 13. Nothing in this Act, except as specifically pro-

vided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

STATEMENT OF THE CASE

A. Facts[2]

The Union[3] was certified on May 22, 1972, as the exclusive bargaining representative of the employees of Vulcan Materials Company (Vulcan or Employer)[4] at its Winston-Salem, North Carolina Central Service Shop. On October 2, 1972, the Union engaged in a lawful primary strike at the Employer's Winston-Salem operation in support of its bargaining demands (A. 174). The picketing was extended to the Employer's Chattanooga, Tennessee operation on October 20, 1972 (A. 207).

Vulcan is divided into three groups[5] – Construction Materials, Chemicals and Metallics (A. 88). Within the Construction Materials group are five divisions. Relevant here are the Chattanooga Division in Tennessee and the Mideast Division in Winston-Salem, North Carolina, both of which produce crushed stone (A. 89-90).

1. Corporate Labor Relations

Vulcan's corporate staff at its Birmingham, Alabama headquarters includes five labor relations experts headed by Carl Whitten, Manager of Industrial Relations (A. 82, 87). The salaries, benefits and expenses of the labor relations staff are paid by the Employer, with no remuneration from any division or group (A. 167, 224-225). The labor relations

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2. The "Facts" are basically undisputed. The dispute involves their probative value and significance.

3. Local Union No. 391, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

4. The Board's Certification of Representative identifies the Employer as "Vulcan Materials Company." (A. 455). "A" refers to the Appendix filed in the court of appeals.

5. The Employer also has several wholly-owned subsidiary corporations (A. 53, 252).

staff counsels, guides and helps all of the Employer's operations (A. 87, 95, 116, 232). It maintains copies of all contracts (A. 229-230); attempts to create uniformity (A. 104); and, the various contract proposals in evidence demonstrate uniform pagination (A. 117-118, 230-232).

The negotiations in Winston-Salem and Chattanooga[6] reveal the role of the Birmingham staff. Whitten was the chief spokesman and principal negotiator for the Employer in Winston-Salem (A. 172, 198, 244, 255). He participated in and did over 90% of the talking for the Employer in the negotiations over a four-month period[7] (A. 95-96, 183-184, 235-236, 244, 248, 255-256). He proposed the checkoff authorization for "Vulcan Materials Company" (A. 456, 247-248, 251-252). He was the *only* representative of the Employer to submit proposals; to arrange and agree upon meeting dates; to write out proposals in his own handwriting; and to initial agreed-upon proposals (A. 344-370, 118-121, 126-127, 157, 184-185, 244-247, 249, 255-256).

Whitten's assistant, Robert Majors, made three trips to Winston-Salem. He checked and validated a wage study (A. 169, 186, 188, 222, 226-227); attended negotiations; recommended a supervisor's training course (A. 227); and personally prepared the supervisors for a strike (A. 185-187, 227-229). When the strike began, he rushed to Winston-Salem to counteract it (A. 187, 190-191, 229).

In Chattanooga, Whitten and Majors participated in both the quarry and ready-mix negotiations (A. 222-223). Majors was the main and principal negotiator for the Employer and did over 90% of the talking[8] (A. 139, 239-240, 242). He

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6. The Chattanooga location was previously organized by another local union.

7. The Employer contended that Mideast Division President Louis Graham controlled all decisions but he never met with the Union either in or out of negotiations (A. 123-124, 249).

8. Majors communicated with the Chattanooga union on the stationery of both Chattanooga and Birmingham as "Manager, Labor Relations" (A. 434-435, 142-144). He wrote the union on his Birmingham letterhead and referred to *"our* employees represented by your Union at *our* Company's Chattanooga Quarry" (A. 143-145) (emphasis added).

was the *only* Employer representative to initial changes or corrections in the contract (A. 428-431, 134-136, 212-213, 218, 223-224). He signed the quarry contract (A. 424. 131-134, 218-220, 223).

In the 1970 ready-mix negotiations, Majors drafted and signed the agreement to extend the contract (A. 444-445, 147-149, 213, 218-219). Negotiations were scheduled for the convenience of Whitten and Majors (A. 447-449, 138, 152-153, 214-215). Majors settled the strike and drafted an agreement resolving the final deadlocked issue[9] (A. 454, 239) Whitten recommended the settlement (A. 164-165).

The Employer locked out its employees during the 1970 quarry negotiations. Chattanooga union officials communicated directly with Majors to end the lockout (A. 441, 146, 153). Majors and Birmingham attorney, John Coleman, represented the Employer in Board and unemployment cases involving the lockout (A. 450-453, 153-157, 165-166). Majors, Whitten and Attorney Coleman also participated in the processing of grievances and arbitration with the Chattanooga union (A. 446, 106, 142, 149, 151-152, 215, 222).

2. Corporate Financial Control

Vulcan is a New Jersey corporation (A. 88). It files a single income tax return with the Internal Revenue Service (A 57-58). Its stock is traded on the New York Stock Exchange under the corporate name (A. 115). It has been involved in, and settled in its corporate name, antitrust suits brought by the Federal Trade Commission (A. 58). Its 1970 Annual Report discusses the Construction Materials Group as an entity (A. 307).

The Employer's Birmingham staff executes Real Estate Bonds and purchases of real property in the corporate name (A. 49-50). Although the property is located within the jurisdiction of the Employer's Mideast Division, the bonds and documents contain no reference to the Division (A. 50).

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9. The Employer argued that Chattanooga Division President Morris Ellman controlled labor relations, but he attended at most one negotiating session (A. 137, 151, 209-210, 214, 238, 240-241).

Similarly, the Employer's long-term loans and the funding of its divisional operations are handled by the Birmingham office. Thus, its 1970 Annual Report refers to a new $10,000,000 loan and the refinancing of outstanding debts (A. 308). The Employer in its corporate name obtained major financing from the Prudential Life Insurance Company and three banks (A. 308); obtained medical and life insurance policies from the Protective Life Insurance Company (A. 406-408, 128); and purchased land in Winston-Salem (A. 305).

The Mideast and Chattanooga Divisions are required to submit voluminous reports to Birmingham on forms supplied by the home office, including a Daily Cash Depository Report (A. 320, 323); a Weekly Cash Report (A. 321, 324); a Weekly Cash Requirements Report (A. 322, 325); and a detailed Monthly Balance Sheet (A. 70). Other required reports include Capital Projects Progress; Equipment Leases; projected balances; Mobil Equipment Inventory; Inventory of Real Property and Other Specified Assets; Automotive Equipment Inventory; Comparative Sales and Earnings; and Adequacy of Allowance for Doubtful Accounts (A. 67-71). All substantial purchases and actions must be approved by the Division and by the two Vice Presidents in charge of the Group and Planning from the Birmingham headquarters (A. 312, 62-66). Vulcan also has an internal audit section which audits the Employer's locations and exercises detailed control over its Divisions (A. 329, 71).

The 1970 Annual Report advised shareholders that to control pollution the Employer had established a Director of Environmental Control for the Chemical and Metallic Groups and a Construction Materials Group would be established within the Corporate Facilities Planning and Engineering Department (S. A.).[10]

3. Public Image

In its 1970 Annual Report, the Employer informed stockholders that "The Construction Materials Division *as a*

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10. "S. A." refers to the Supplemental Appendix filed with the court of appeals.

group reported a healthy increase in sales at a modest increase in pretax earnings . . . . " (A. 393-400) (emphasis added). In Winston-Salem and Chattanooga, on advertising billboards and its trucks, the Employer projects itself as Vulcan Materials Company (A. 342, 112, 114-115, 180-181, 254).[11] Employees in Winston-Salem and Chattanooga are covered by the same company-wide medical and group life insurance plan which refers to "Vulcan Materials Company" (A. 389-390, 122-123, 406-408, 128). Salaried employees participate in a Thrift Plan announced by the Employer's Chief Executive Officer (A. 409-413). The home office computes and forwards severance benefits directly to employees (A. 302-303, 48-49). A company-wide retirement plan covers "most of the company's employees who are not covered by union-administered plans" (A. 401). Employee earning statements are on a "VMC" form and W-2 Forms for income tax purposes list the Employer as "Vulcan Materials Company" with the Birmingham address (A. 51-52, 110-111, 201, 263, 309, 340). Only the individual paychecks bear the Division address (A. 282-283).

Truck drivers in both Winston-Salem and Chattanooga receive the same Safety Program Instructions, yearly safe driving citations, and safety award pins which are distributed by and refer only to " Vulcan Materials Company" and the Birmingham address[12] (A. 404-405, 29, 239-240).

B. The Board's Decision and Order

Despite these undisputed facts, the Board concluded that the Birmingham labor relations staff "served simply in an advisory capacity" and that there was "no centralized control of the labor relations of its divisions" (App. p. 49).

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11. The trucks at both Divisions are painted in precisely the same blue and gold colors and bear the same Vulcan decals (A. 341, 112-115, 158, 181-182, 253-254).

12. The safety citation certifies that the driver "has driven company vehicles" (A. 338-339, 108-110, 180, 260-261). Even the gasoline credit cards carried by drivers in Chattanooga and Winston-Salem indicate only "Vulcan Materials Company " (A. 331).

Finding that "Vulcan did not maintain actual or active control of the labor relations policies of either Chattanooga or Mideast," the Board held that each Division was a separate "person" within the meaning of §8(b)(4)(B) of the Act and that the extension of the Union's picket line to Chattanooga was secondary conduct in violation of the Act (App. p. 50). The secondary conduct forced "Chattanooga to cease doing business with its customers and suppliers" (App. p. 43).

C. The Court of Appeals Decision

The Court of Appeals enforced the Board's Order. It agreed with the Board that "Although the ultimate power to control both Mideast and Chattanooga resides in Vulcan, in fact that power has not been exercised; on the contrary, each division exercises final and independent control over its operations, including labor relations" (App. p. 32).

Although refusing to vote for rehearing *en banc*, Chief Judge Bazelon and Judge Wright castigated the Board and Panel's reasoning. They stated that by focusing on "centralized control" and "persons," the Board

> completely overlooks the other, potentially more important questions raised by the activity of Whitten and Majors – *viz.*, whether the corporation, by allowing its officials to participate in divisional negotiations, was able to obtain a tactical advantage against the union, which might reasonably have concluded from their presence that it was facing the full economic might of the corporation; and whether the divisions, by inviting the participation of the corporate officials and by heeding their advice, were able to insure itself of corporate support in any ensuing labor disputes. These questions seem far more relevant to the ultimate issue of "neutrality" than the largely formal questions upon which the Board and the panel focused (App. pp. 22 - 23).

Judge Bazelon accused the Board and the Panel of applying a *per se* rule in violation of *National Woodwork Manufacturers Ass'n v. N.L.R.B.*, 386 U. S. 612 (1967) (App. p. 20).

REASONS FOR GRANTING WRIT

1. The issue, the right of the Board to restrict a union's strike to one location or division of the struck employer, presents a substantial and recurring problem which potentially affects every strike situation in which an employer covered by the Act has more than one location.[13] "There is a crying need for clarity in answering this question." Asher, "Secondary Boycotts: The Ally Doctrine Revisited," 4 Loyola U. L. J. 292, 293 (1973). The Employer and the Board cannot convert primary activity into a secondary boycott by fragmenting separate locations or divisions into separate "persons" in order to avoid or isolate the economic impact of a strike.

The historic practice of a union in a strike is to seek the aid of other employees of the struck employer.[14] This call for concerted activity is normally effectuated by extending the strike and picketing to other locations of the primary employer. "Primary employees have traditionally been assured of the right to take concerted action against their employer . . . ." *Houston Insulation Contractors Assn. v. N.L.R B.*, 386 U. S. 664, 668 (1967).

In the world of corporate giants, the employees can influence their employer's collective bargaining decisions only by seeking help from fellow employees at other locations of the employer. To restrict the union's strike to one location or division of an employer is to destroy or substantially abridge the union's rights under the Act, contrary to the intent of Congress. The analogy would be for the Board to deprive an employer of its financial power or the right to lockout or

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13. The frequency of the problem is suggested by the litigation culminating in *Buffalo Forge Co. v. Steelworkers*, 428 U. S. —, 49 L.Ed.2d 1022, 1028 fn. 9 (1976).

14. Congress has statutorily protected the right to strike in §§7 and 13 of the Act. Section 13, in fact, prohibits any interference with the right to strike which is not "specifically provided for" in the Act. *N.L.R.B. v. International Rice Milling Co.*, 341 U. S. 665, 672 (1951); *N.L.R B. v. Drivers Local Union 639*, 362 U. S. 274, 282 (1960); *National Woodwork*, 386 U. S. at 643. Congress inserted the proviso to §8(b)(4)(B) to insure that traditional primary activity would not be prohibited by the secondary boycott provisions of the Act. *Id.* at 632.

to hire replacements during a strike. The Board cannot be "an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands." *N.L.R.B. v. Insurance Agents International Union*, 361 U. S. 477, 497 (1960).

The right to strike is fundamental to our system of industrial relations under the Act. *Division 1287 . . . Motor Coach Employees v. Missouri*, 374 U. S. 74, 82 (1963). That right is preserved only if a union can maximize economic pressure against the primary employer to obtain a collective bargaining agreement. The employer has a similar right to pressure the union with its arsenal of weapons, including the lockout. Any restriction on these rights radically shifts the balance of power. The Board is forbidden from aligning itself with one party to the labor dispute by limiting the other party's rights as it has done in this case. *American Ship Bldg. Co. v. N.L.R B.*, 380 U. S. 300, 317 (1965); *H. K. Porter Co., Inc. v. N.L.R.B.*, 397 U. S. 99, 109 (1970); *Local 76, Machinists v. Wisconsin Employment Rel. Commission*, — U. S. — (6-25-76), 49 L.Ed.2d 396, 407-408.

2. The Board's decision violates the primary-secondary dichotomy as reaffirmed by this Court in *National Woodwork* and *Houston Insulation, supra*.

Until 1970, a union enjoyed the right to extend a lawful primary picket line to other locations of the same corporate employer.[15] In the *Hearst* Doctrine,[16] the Board held for the first time that §8(b)(4)(B) may bar the extension of picket lines to separate divisions of a single corporation.

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15. *Alexander Warehouse & Sales Co.*, 128 N.L.R.B. 916 (1960). In *Montgomery Ward & Co.*, 122 N.L.R.B. 1259, 1270 (1959), the Board ruled that §8(b)(4) "do[es] not isolate one store in the company's chain from the other stores, nor do these provisions provide that economic pressure may be applied upon a primary employer only at the segment of his operations at which the immediate dispute arose."

16. *Hearst I: San Francisco Examiner, Div. of The Hearst Corp.*, 185 N.L.R.B. 303 (1970), *enf'd*, 443 F.2d 1173 (9th Cir. 1971), *cert. denied*, 404 U. S. 1018. *Hearst II: Baltimore News American, Div. of The Hearst Corp.*, 185 N.L.R.B. 593 (1970), *enf'd*, 462 F.2d 887 (D.C. Cir. 1972).

In *Houston Insulation*, the Court held that employees in one bargaining unit could strike in support of employees in a different bargaining unit of the same employer even if the bargaining units were located on different premises.

> A boycott cannot become secondary because engaged in by primary employees not directly affected by the dispute, or because only engaged in by some of the primary employees and not the entire group. Since that situation does not involve the employer in a dispute not his own, his employees' conduct in support of their fellow employees is not secondary, and, therefore, not a violation of §8(b)(4)(B). 386 U. S. at 668-669.

Houston Insulation is directly on point in protecting the right of Vulcan's employees in Chattanooga to support striking employees in Winston-Salem. Whether picketing in Chattanooga is conducted by the Winston-Salem or Chattanooga employees, there is no way for that concerted activity to become secondary; the work stoppage does not involve the employer in a dispute not his own. *See*, Asher, "Secondary Boycotts – Allied, Neutral and Single Employers," 52 Geo. L. J. 406, 417-418 (1964).

National Woodwork further undermines the Board and Court rationale for the *Hearst* Doctrine and its application to this case. There the Court acknowledged that only *"genuinely neutral"* employers are protected by §8(b)(4). *Supra*, 368 U. S. at 635 (emphasis added). Vulcan cannot at the same time be the prime and the neutral; such a proposition is a contradiction in terms.[17]

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17. By definition, the same person cannot be an "other person." That type neutrality would be contrary to the statement by Senators Goldwater and Dirksen, proponents of the Landrum-Griffin amendments, that, "The basic justification for banning secondary boycotts is to protect *genuinely neutral employers* and their employees, not themselves involved in a labor dispute, against economic coercion designed to give a labor union victory in a dispute with some *other employer.*" 1 1959 Leg. Hist. 474 (emphasis added). This legislative history is consistent with the understanding of Senator Taft in 1947 that the purpose of the secondary boycott provision was to protect "a third person who is *wholly unconcerned* in the disagreement between the employer and the employees" (emphasis added), 93 Cong. Rec. 4198. In 1951 Judge Learned Hand explained that what is now §8(b)(4)(B) was

3. The Board's assertion that separate divisions of a single corporation constitute separate "persons" is wrong as a matter of law. Like §2(1) of the Act, §8 of the Sherman Act, 15 U. S. C. §7, defines "person" to "include" corporations and associations. Yet, under the enterprise theory, "a corporation cannot conspire with its unincorporated divisions" because "*there must be at least two persons* or entities to constitute a conspiracy, and *a corporation cannot conspire with itself* any more than a person can." *Cliff Food Stores, Inc., v. Kroger, Inc.*, 417 F.2d 203, 206 (5th Cir. 1969) (emphasis added).

This reasoning has been applied to preclude, as a matter of law, a conspiracy among unincorporated divisions of a parent corporation. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 84 (9th Cir. 1969) ("It is most unlikely that partially autonomous divisions of a single enterprise will or can operate completely independently of each other.") Similarly, under the Internal Revenue Code, 26 U. S. C. §7701(a)(1), and the Bankruptcy Acts, 11 U. S. C. §1(8), the corporate "person" includes its unincorporated divisions as a single entity. Moreover, the officers and directors of the parent corporation have a fiduciary duty to all stockholders, and may not blind themselves to the activities of any unincorporated division.[18]

The Board's test for "commonality" – that the parent corporation "maintain actual or active control of the labor relations policies" of the Divisions (App. p. 20) – artificially creates "neutral" persons. Even in a case involving more than one corporation the First Circuit has held that there need

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17. cont'd

intended to "bear, not upon the employer who is a party to the dispute, but upon some third party who has no concern in it." *IBEW, Local 501 v. N.L.R.B.*, 181 F.2d 34, 37 (2nd Cir. 1951). The Board's decision is at odds with and does violence to this history of the law of secondary boycotts.

18. This Court has cautioned the Board against ignoring "important Congressional objectives" evidenced by other statutes. *Southern Steamship Co. v. N.L.R.B.*, 316 U. S. 31, 47 (1942). Thus the Board's rejection of these issues (App. p. 22) was erroneous.

be "actual common control over labor policies *or any other phase of the operations*" of commonly owned corporations. *J. G. Roy & Sons*, 251 F.2d at 773 (emphasis added). Here the *Roy* test is clearly satisfied. Vulcan exercises complete control over real estate purchases, long-term financing, financial accountability, advertising, employee fringe benefits and environmental control.

4. The conclusion of the Board that Chattanooga was a "neutral" employer in Winston-Salem's labor dispute results from a mechanical analysis which "ignores the realities of this labor conflict." *Enterprise Ass'n v. N.L.R.B.*, 521 F.2d 885, 895 (D. C. Cir. 1975), *cert. granted*, 424 U. S. 908.[19] The Board's test ignores the parent's substantial involvement in Divisional labor relations. Vulcan presented a unified image to the public, the government and to its employees. In these circumstances, Vulcan cannot claim to be "wholly unconcerned" with divisional labor disputes. *N.L.R.B. v. Local 825, Operating Engineers*, 400 U. S. 297, 302-303 (1971). Vulcan's annual report refers shareholders to labor disputes which reduced anticipated earnings (A.307; Supp. A). Vulcan's labor relations experts, Whitten and Majors', active participation in divisional labor relations evidences Vulcan's desire to influence the course of such negotiations, to avoid strikes, to minimize labor costs and, where strikes occur, to train supervision so that the strike will have minimal impact on production and profitability. As Judge Bazelon indicated below (App. p. 23), this involvement permitted Vulcan to suggest that the Union's dispute was with a corporation with 1971 sales of $240 million (A. 399), not with a mere Division. As the Sixth Circuit stated, "It requires a greater degree of credulity than is possessed by this Court to accept the view that [the subsidiary's operation officers] could inaugurate

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19. *See also: Local 742, Carpenters v. N.L.R.B. (J. L. Simmons Co.)*, 533 F.2d 683, 692 (D.C. Cir. 1976), *cert. pending* in Case No. 75-1706. Other circuit courts have also criticized the Board's use of a "technical exercise in the intracacies of corporate structure rather than a realistic common sense evaluation of neutrality." *N.L.R.B. v. Teamsters Local 810 (Sid Harvey, Inc.)*. 460 F.2d 1, 6 (2d Cir. 1972); *Vulcan Materials Co. v. Steelworkers*, 430 F.2d 446, 451, 453 (5th Cir. 1970), *cert. denied*, 401 U. S. 963. *Cf. National Woodwork, supra*, 386 U. S. at 625.

or establish a labor policy . . . that did not meet with the absolute approval of the Board of directors." *Royal Oak Tool and Machine Co.*, 320 F.2d 77, 81 (6th Cir. 1963).

5. The Court of Appeals decision in the instant case conflicts with a decision of the Court of Appeals for the Eighth Circuit in its treatment of corporate control over subsidiaries and unincorporated divisions. In *Royal Typewriter Co. v. N.L.R.B.* 533 F.2d 1030 (8th Cir. 1976), *enforcing*, 209 N.L.R.B. 1006 (1974), the court was asked to assess the corporate parent's liability for unfair labor practices committed by a subsidiary. On evidence substantially similar to that in the instant case, the court found that local control over day-to-day labor matters was not controlling. "A more critical test," the Court held, is

> whether the controlling company possessed the *present and apparent* means to exercise its clout in matters of labor negotiations by its divisions or subsidiaries and whether its course of conduct encouraged or permitted the local negotiators to so represent the situation to union negotiations for the purpose of achieving a tactical or strategic objective. The presence of Irwin [the corporate director of labor relations, acting in an advisory capacity] when some of these representations were made gave additional credibility to the statements. We do not think that a conglomerate can act in negotiations as a single employer and then expect to avoid the consequences if unfair labor practice charges result from such conduct.

Id. at 1043 (emphasis added). *See also, Local No. 627, Operating Engineers v. N.L.R.B. (South Prairie Constr. Co.)*, 425 U. S. 800 (1976).

We submit that the Board and the courts cannot apply the "present and *apparent*" control test to determine the corporate "person" under §10(c) of the Act, and apply the "active and *actual*" test to determine the corporate "person" under §8(b)(4)(B). *Cf. N.L.R.B. v. Deena Artware, Inc.*, 361 U. S. 398, 402-403 (1960).

6. The *Hearst* Doctrine as applied in this case, misconstrues §8(b)(4)(B) as interpreted by this Court in *N.L.R.B. v. Servette, Inc.*, 377 U. S 46 (1964).[20] After analyzing the 1959 amendments to §8(b)(4)(B), which introduced the term "person," the Court concluded, "But these changes did not expand the type of conduct which §8(b)(4)(A) condemned; that is, union pressures calculated to induce the employees of a secondary employer to withhold their services in order *to force their employer to cease dealing with the primary employer." Id.* at 52-53 (emphasis added); *National Woodwork*, 386 U. S. at 624. Clearly, the crucial element underlying §8(b)(4)(B) is missing in the *Hearst* cases: there is absolutely no evidence of any business relationship between the secondary employer (Chattanooga) and the primary employer (Winston-Salem). Hence, the Board found that the picket line at Chattanooga caused "Chattanooga to cease doing business with its customers and suppliers" (App. p. 43).

The Board interpretation perverts §8(b)(4)(B). Every strike is aimed at causing a cessation of business between the primary employer and his suppliers and customers. This is economic pressure by which the Union gains advantages at the bargaining table. Yet this Court has never construed §8(b)(4)(B) to prohibit this incidental impact on neutral customers or suppliers. *National Woodwork*, 386 U. S. at 626-627, 632.

Clearly, the Union extended its picket line to Chattanooga to restrict *Vulcan's* profits, not to curtail business between Chattanooga and Winston-Salem. As Board Member Brown recognized in his dissent, the *Hearst* Doctrine restricts strike pressure to the single locus of dispute in a multifaceted, integrated corporation.[21] Only by affecting the

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20. The Board is clearly wrong that the substitution of the word "person" for "employer" in 1959 permits its present expanded interpretation of §8(b)(4)(B) of the Act. *Id.* at 51-52.

21. No reason exists for the Board to "fix the 'situs' of a dispute at only one of the primary employer's numerous business activities, thereby isolating other employees of that same primary employer from exercising their statutory right under §7 . . . ." *N.L.R.B. v. General Drivers Local 968 (Otis Massey)*, 225 F.2d 205, 210 (5th Cir. 1955). *See*, II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 1857.

parent's operating profits can a union seek to impose significant economic pressure on the parent. *American Federation of Television and Radio Artists*, 185 N.L.R.B. at 593-594.

On many occasions, this Court has cautioned the Board against disregarding the spirit of §8(b)(4)(B) in favor of blind adherence to its literal language. *National Woodwork*, 386 U. S. at 619.[22] By focusing on Chattanooga's customers and suppliers rather than on the corporate nexus, the Board has improperly restricted the right to strike guaranteed by §§7 and 13.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for the Petitioner

February, 1977

22. *See also, Local 761, IUE v. N.L.R.B. (General Electric)*, 366 U.S. 667 (1961); *USW v. N.L.R.B. (Carrier Corp.)*, 376 U.S. 492 (1964); *N.L.R.B. v. Fruit and Vegetable Packers and Warehousemen, Local 760 (Tree Fruits)*, 377 U.S. 58 (1964).

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App. D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1167

LOCAL UNION NO. 391, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

CHATTANOOGA DIVISION, VULCAN MATERIALS CO., INTERVENOR

Filed September 9, 1976

Before: BAZELON, *Chief Judge*; WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges*.

ORDER

The suggestion of petitioner for rehearing *en banc* having been transmitted to the full Court and no Judge having requested a vote thereon, it is

ORDERED by the Court *en banc* that petitioner's aforesaid suggestion for rehearing *en banc* is denied.

Per Curiam

STATEMENT OF CHIEF JUDGE BAZELON, IN WHICH JUDGE WRIGHT JOINS, AS TO WHY HE VOTED TO DENY REHEARING EN BANC.

Although, for the reasons outlined below, I am troubled by the Board's opinion in this case and by the panel's affirmance of it, I vote to deny a rehearing *en banc*. I do so largely because I am hopeful that the Supreme Court's consideration of Enterprise Ass'n. v. NLRB, —— U.S. App. D.C. ——, 521 F.2d 885 (1975) (*en banc*) (hereinafter *Enterprise Ass'n*), *cert. granted*, —— U.S. ——, 96 S.Ct. 1101, will provide some guidance on the issues that I find troubling. Moreover, I am not convinced that this case rises to the level of "exceptional importance" required by Fed. R. App. Pro. Rule 35, both because no practical consequences would flow from a reversal of the Board's decision, and because the panel's opinion here is a relatively narrow one, closely tied to the facts of this particular case.[1]

While this case is therefore not an appropriate one for consideration by the full court, I do wish to highlight some of the problems raised by the Board's decision. In National Woodwork Manufacturers Ass'n. v. NLRB, 386 U.S. 612 (1967) (hereinafter *National Woodwork*), the Supreme Court held that, in order to distinguish protected primary activity from illegal secondary activity, the Board must engage in a probing inquiry into "all the surrounding circumstances" of the case before it. *Id.* at

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[1] The two cases upon which the panel relies, American Fed. of Television and Radio Artists v. NLRB, 149 U.S. App. D.C. 272, 462 F.2d 887 (1972), and Los Angeles Newspaper Guild, Local 69 v. NLRB, 443 F.2d 1173 (9th Cir. 1971), enfg. 185 NLRB No. 25 (1970), cert. denied, 404 U.S. 1018 (1972), are similarly narrow. Indeed, one of the more troubling aspects of this case is the Board's apparent eagerness to derive from these two narrow holdings a broad, generally applicable per se rule.

644. The Board's opinion here appears to fall far short of that standard. Instead of the wide-ranging, flexible inquiry required by *National Woodwork*, the Board has applied an essentially per se rule, of the sort repeatedly rejected by this court, most recently in *Enterprise Ass'n, supra*, at 905.

The petitioner, Local 391, International Brotherhood of Teamsters (the Union) represents construction employees at one unincorporated division (Mideast) of the Vulcan Materials Company (Vulcan). At issue here is the Union's asserted right to extend its lawful picketing of that *division* to a second unincorporated division (Chattanooga) of the same company. The NLRB found that these two divisions constitute separate "persons" for the purposes of § 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4)(B), and that the Union's action in extending its picketing from one division to the other was therefore an illegal secondary boycott.

The rule upon which the Board rests its decision is deceptively simple: "[S]eparate corporate divisions *are* separate 'persons,' . . . if neither the division nor the parent exercises actual or active, as opposed to merely potential, control over the everyday operations or labor relations of the other." App. at 5 (emphasis added). Although the Trial Examiner (whose opinion was adopted by the Board) mentioned a number of other facts contained in the record tending to support his conclusion that the divisions were largely autonomous, it is clear that, for him, it was the lack of day-to-day control of the divisions' labor relations which was dispositive:

> I have heretofore found that Vulcan did not maintain actual or active control of the labor relations policies of either Chattanooga or Mideast. I therefore conclude that, on the facts here presented, Chattanooga was an unoffending employer and a Statutory "person" during the course of Respondent's dispute with Mideast. Accordingly, I conclude that, by picketing Chattanooga on and after October 20, Respondent violated Section 8(b)(4)(B) of the Act. (App. at 10).

The extent of Vulcan's control over the labor relations policies of Mideast and Chattanooga was certainly a relevant factor to be considered by the Board in determining whether those two divisions constituted separate "persons." But it was not the only relevant factor. *See* Local No. 627, International Union of Operating Engineers v. NLRB, —— U.S. App. D.C. ——, ——, 518 F.2d 1040, 1045 (1975), *aff'd on this point*, —— U.S. ——, ——, 48 L. Ed. 2d 382, 386 (1976). As has frequently been pointed out, the purpose of § 8(b)(4)(B) is "to prohibit coercive union activity that is directly exerted against an 'unconcerned' or 'neutral' employer, drawn by the union's activities into 'disputes not his own.'" *Enterprise Ass'n, supra*, at 894, quoting *National Woodwork, supra*. In assessing the "neutrality" of a supposedly "secondary" employer, there is no single factor or criterion upon which the Board may rely. "In the final analysis, . . . the question of neutrality cannot be answered by the application of a set of verbal formulae." Vulcan Materials Co. v. United Steelworkers of America, 430 F.2d 446, 451 (5th Cir. 1970), *cert. denied*, 401 U.S. 963 (1971). What is called for is "a realistic, common sense evaluation of neutrality," not "a technical exercise in the intricacies of corporate structure. . . ." NLRB v. Local 810, Steel, Metals, Alloys, and Hardware Fabricators, 460 F.2d 1, 6 (2d Cir. 1972).

Certainly a "common-sense" evaluation of the "neutrality" of a corporation *vis-a-vis* its own divisions must include some consideration of the extent to which the corporation is—or appears to be—able and willing to

support its divisions (financially and otherwise), if they should become involved in protracted labor disputes. A division which can count on this sort of real or apparent backstopping from its corporate headquarters will obviously have greater bargaining strength than a division which truly stands alone. While the importance of this consideration would seem to be self-evident, neither the Board's opinion nor the panel's even makes reference to it.[2]

Because of the Board's failure to take this consideration into account, its analysis of the participation of two corporate officials (Whitten and Majors) in the divisions' labor negotiations seems to be somewhat beside the point. In the Board's view, the role played by these two officials was at the "crux" of this case. App. at 8. Thus, it was the Board's finding that Whitten and Majors participated in the negotiations only at the invitation of the divisional presidents and that "they served simply in an advisory capacity during bargaining sessions" which led the Board to conclude that "Vulcan did not exercise a centralized control of the labor relations of its divisions." App. at 8-9. And, as noted *supra*, it was because of this lack of "centralized control" that the Board found the divisions to be separate "persons." This analysis completely overlooks the other, potentially more important questions

[2] The panel notes that the "independence" of the Vulcan divisions appears to be "genuine" and that "[a] specious intra-corporate arrangement, contrived to take advantage of the protection of the secondary boycott provisions of the Act, obviously would stand on a different footing." Slip op. at 8. While I am not convinced that the Board's inquiry here was sufficiently thorough to uncover a "specious intra-corporate arrangement," that is not really the source of my concern. Rather, I am concerned that the kind of corporate backstopping I have described may enable even genuinely "independent" divisions to enhance their bargaining positions significantly.

raised by the activities of Whitten and Majors—*viz.*, whether the corporation, by allowing its officials to participate in divisional negotiations, was able to obtain a tactical advantage against the union, which might reasonably have concluded from their presence that it was facing the full economic might of the corporation; and whether the divisions, by inviting the participation of the corporate officials and by heeding their advice, was able to insure itself of corporate support in any ensuing labor disputes. These questions seem far more relevant to the ultimate issue of "neutrality" than the largely formal questions upon which the Board and the panel focused.[3]

[3] *Compare* the recent opinion of the Eighth Circuit in Royal Typewriter Co. v. NLRB, No. 74-1250 (8th Cir., March 31, 1976). In that case the Board had determined that Litton Industries, along with its wholly owned subsidiary Litton Business Systems, and the latter's unincorporated Royal Products Division all constituted a "single employer" for the purpose of assessing responsibility for certain unfair labor practices. The Court affirmed, and provided the following guidance on the standards which should govern "single employer" determinations:

> In assessing the appropriateness of single employer treatment, the fact that day-to-day labor matters are handled at the local level is not controlling. A more critical test is whether the controlling company possessed the present and apparent means to exercise its clout in matters of labor negotiations by its divisions or subsidiaries and whether its course of conduct encouraged or permitted the local negotiators to so represent the situation to union negotiators for the purpose of achieving a tactical or strategic objective. The presence of Irwin [Litton's director of labor relations] when some . . . representations were made gave additional credibility to the statements. We do not think that a conglomerate can act in negotiations as a single employer and then expect to avoid the consequences if unfair labor practice charges result from such conduct.

Slip op. at 24-5 (citations omitted).

See also American Federation of Television and Radio

Section 8(b)(4)(B) has been described as an accommodation between the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own."[4] (1951). This accommodation is an uneasy one, which requires the Board, and the courts, to engage in "the drawing of lines more nice than obvious . . . ."[5] But however difficult this task may be, the Board cannot properly fulfill its responsibilities by relying on mechanical tests and per se rules, which "subvert[] the congressional purpose by focusing on only one among many potentially relevant factors." *Enterprise Ass'n, supra* at 905.

Artists—Baltimore Local, 185 NLRB No. 26, at 594 (1970) (Member Brown dissenting).

[4] *National Woodwork, supra,* at 626-7, *quoting* NLRB v. Denver Bldg. and Constr. Trades Council, 341 U.S. 675, 692 (1951).

[5] *National Woodwork, supra,* at 645, *quoting* Local 761, Electrical Workers v. Labor Board, 366 U.S. 667, 674 (1961).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1167

September Term, 1975

Local Union No. 391, International
Brotherhood of Teamsters, etc.,

Petitioner,

v.

National Labor Relations Board
Respondent,

and

Chattanooga Division, Vulcan Materials Co.,

Intervenor.

Before: MacKinnon and Robb, Circuit Judges; Christensen*, Senior District Judge for the District of Utah.

ORDER

On consideration of petitioner's petition for rehearing, it is ORDERED by the Court that petitioner's aforesaid petition is denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit
FILED SEP 8 1976
GEORGE A. FISHER
Clerk

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*Sitting by designation pursuant to Title 28 U. S. Code Section 294(d).

APPENDIX C

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1167

LOCAL UNION NO. 391, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ETC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

CHATTANOOGA DIVISION, VULCAN MATERIALS CO., INTERVENOR

Petition for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board

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Argued March 7, 1975

Decided June 23, 1976

Hugh J. Beins for petitioner.

Peter M. Bernstein, Attorney, National Labor Relations Board of the bar of the Court of Appeals of New York, *pro hac vice* by special leave of court, with whom *John S. Irving*, Deputy General Counsel, *Patrick Hardin*,

Associate General Counsel, *Elliott Moore*, Deputy Associate General Counsel and *Robert A. Giannasi*, Assistant General Counsel, National Labor Relations Board, were on the brief for respondent.

John J. Coleman, Jr., for intervenor.

Before: MACKINNON and ROBB, *Circuit Judges* and CHRISTENSEN,* *Senior District Judge* for the District of Utah

PER CURIAM: This case comes to us upon the petition of Local Union No. 391, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union) to review and set aside an order of the National Labor Relations Board. The Board has filed a cross application for enforcement of its order, which directed the Union to cease and desist from a secondary boycott. The Board's decision and order are reported at 208 NLRB No. 81 (1974).

The Board found that the Union picketed the premises of the Chattanooga Division, Vulcan Materials Company (Chattanooga) with whom the Union had no dispute, thereby coercing Chattanooga and inducing its employees to strike in furtherance of the Union's labor dispute with Mideast Division, Vulcan Materials Company (Mideast), in violation of section 8(b)(4)(i)(ii)(B) of the National Labor Relations Act as amended. 29 U.S.C. § 158(b)(4)(i)(ii)(B) (1970). This finding was predicated upon the Board's further finding that Chattanooga and Mideast are separate persons within the meaning of section 8(b)(4) of the Act. 29 U.S.C. § 158(b)(4). The question presented to us is whether substantial evidence on the record as a whole supports the Board's findings. We conclude that it does.

There is no substantial dispute about the facts, which were developed in a hearing before an administrative law

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

judge. On the evidence presented to him he found that Vulcan Materials Company is a New Jersey corporation engaged in the manufacture and marketing of chemicals, metals and heavy construction materials. The company's headquarters and chief executive officers are located in Birmingham, Alabama. Vulcan conducts its operations through a chemical group, a materials group and five construction divisions within a construction materials group. The chemicals group is located in Wichita, Kansas and the materials group in Sandusky, Ohio. Mideast and Chattanooga are two of the construction divisions. Mideast, located in Winston-Salem, North Carolina, produces crushed stone and operates in North Carolina and Virginia. Chattanooga, based in the city of that name, produces crushed stone and ready-mixed concrete and serves the Chattanooga, Tennessee area. Neither division competes with the other, nor with any other division.

Vulcan is managed by a board of directors and an executive committee appointed by the Board. Under them are two executive vice presidents, one for the chemicals and materials group, and one for the construction materials group. Each division is headed by a divisional president who is responsible to the executive vice president and the board of directors for the general management of the division, and for the control and profits of the division. In practice however Mideast and Chattanooga operate independently of each other and of Vulcan. Each divisional president has autonomy in the daily operations of his division. He has sole responsibility for the production and marketing of the division, he alone selects his staff, determines their pay, and hires and discharges personnel. There is no line of advancement for employees between the divisions, or betwen them and Vulcan. There is no interchange of employees between the divisions, nor is there any interchange of products. Interchange of equipment is negligible and on the same

rental basis as when equipment is loaned to or exchanged with competitors. Each division maintains its own payroll, makes its own disbursements, does its own bookkeeping and accounting, and has its own bank account. Although the divisions submit financial reports to Vulcan these are generally informational in nature. A division can incur capital expenditures of up to $50,000 without Vulcan's prior approval. Each division president is responsible for determining the budget for his division.

The administrative law judge also found that there is no day-to-day communication in the usual sense between the divisions or between them and Vulcan. Each division president has broad authority to formulate his individual labor relations policies, to negotiate collective bargaining agreements and to execute these contracts. Although a divisional president may use the services of the industrial relations staff maintained by Vulcan in Birmingham, the use of such services is not obligatory but optional; a member of the staff participates in labor negotiations only at the invitation of a divisional president, who may accept or reject his recommendations. Similarly, pension plans, insurance plans and savings plans which are made available to the divisions by Vulcan may be accepted or rejected by the divisions.

Having won an election conducted by the Board the Union was certified as the collective bargaining representative of a unit of employees of Mideast's central services division. In preparation for the negotiations which were to follow, Louis Graham, president of Mideast, asked Vulcan's manager of industrial relations, Carl Whitten, to participate as a member of the Mideast negotiating team. Vulcan made Whitten available to counsel and guide Mideast, but Mideast was free to accept or reject his recommendations. The other members of the Mideast negotiating team were Jerry Simmons, Mideast manager of administration, and George Bell,

manager of the central services storeroom. As manager of administration, Simmons was responsible for personnel safety and industrial relations. In the past he had engaged in negotiations with other labor organizations without the assistance of the home office. In preparation for the Mideast negotiations with the Union Simmons conducted a wage and economic survey to determine how Mideast compared with the industry.

Robert Majors, Vulcan's manager of manpower planning and development, visited Mideast facilities on three occasions during the negotiations and the subsequent strike. On one occasion, at the invitation of Mideast, he attended the final negotiation session as an unofficial observer. On the other two occasions, likewise by invitation, he assisted in preparing for the strike and devising training programs for supervisors. In 1970 he had assisted the president of Chattanooga in negotiating a contract with Teamsters Local 515. His assistance was invited by Chattanooga's president who directed and controlled the negotiations.

President Graham formulated the Mideast contract proposals and authorized Whitten to act as chief spokesman for Mideast in the negotiations. In the negotiations Whitten informed the Union representatives that although he was from the home office he was present at the invitation of the division and his role would simply be to help the division express its views. He said that Vulcan was decentralized, that each division was responsible for the profits of the business and for its management. Acting as chief spokesman for Mideast in the negotiations, pursuant to specific authority from President Graham, Whitten made tentative agreements with the Union. Graham however reviewed the division's proposals before every negotiating session, rejected some specific recommendations suggested by Whitten, and made the final decisions on all Mideast contract proposals.

After several fruitless discussions Mideast and the Union reached an impasse in their negotiations. Thereafter the Union struck Mideast and commenced picketing the central services division in Winston-Salem. Some two weeks later the Union picketed the Chattanooga ready-mix plant and quarry. At both Winston-Salem and Chattanooga the pickets carried signs bearing the legend "Vulcan Materials Plant on Strike—Teamsters Local 391". The Union did not represent any of Chattanooga's employees and had no labor dispute with Chattanooga. In fact Chattanooga's employees were represented by other unions, including a sister local of Local 391, and there were no labor disputes between Chattanooga and these unions. At the time of the picketing as well as prior thereto, there was no interchange of products or employees between Mideast and Chattanooga, and Chattanooga had not performed any work for Mideast.

The picketing at Chattanooga caused Chattanooga's employees to cease work, completely shutting down operations at Chattanooga. As a result the Board issued its complaint alleging the picketing violated section 8(b)(4)(i)(ii)(B) of the Act. 29 U.S.C. § 158(b)(4)(i)(ii)(B) (1970). After the issuance of the complaint the regional director of Region 10 of the Board petitioned the United States District Court for the Eastern District of Tennessee for an order pursuant to section 10(i) of the Act, temporarily enjoining the picketing at Chattanooga. In an opinion rejecting union contentions which were essentially the same as those presented to us, the court granted the relief prayed for by the regional director. *Phillips v. Local 39, Teamsters*, 82 LRRM 2195 (1973).

There can be no question that in furtherance of its dispute with Mideast the Union picketed Chattanooga, whose employees were members of other unions and had no dispute with Chattanooga. As a result, the Chatta-

nooga employees ceased work and normal operations were closed down. Moreover there is no question that by its picketing the Union induced and encouraged employees of Chattanooga to strike and withhold their services and that the Union thereby restrained and coerced Chattanooga with an object of forcing it to cease doing business with its customers and suppliers. Thus, the issue is whether the Board properly found that Chattanooga is entitled to the protection of the secondary boycott provisions of section 8(b)(4) of the Act. 29 U.S.C. § 158 (b)(4). That section provides, in relevant part, that it shall be an unfair labor practice for a union or its agents:

> (i) to engage in, or to induce or encourage any individual employed by *any person* * * * to engage in a strike or a refusal in the course of his employment to * * * perform any services; or (ii) to threaten, coerce, or restrain any *person* engaged in commerce or in an industry affecting commerce, where in either case an object thereof is
>
> * * * *
>
> (B) forcing or requiring any person * * * to cease doing business with any other *person* . . . . [Emphasis added.]

Further refined, the issue is whether the record supports the finding and conclusion of the Board that Chattanooga is an entity sufficiently separate and distinct to be treated as a "person" in applying the secondary boycott provisions of subsection (B).

We think the record supports the Board's conclusions. Although the ultimate power to control both Mideast and Chattanooga resides in Vulcan, in fact that power has not been exercised; on the contrary each division exercises final and independent control over its operations, including its labor relations. The services of Whitten and Majors were advisory only and were furnished only

at the invitation of the presidents of Mideast and Chattanooga, who made all final decisions. In short, the evidence justifies the finding that the divisions are operated as autonomous enterprises, under the doctrine of *American Fed. of Television and Radio Artists v. N.L.R.B.*, 149 U.S. App. D.C. 272, 462 F.2d 887 (1972); and *Los Angeles Newspaper Guild, Local 69 v. N.L.R.B.*, 443 F. 2d 1173 (9th Cir. 1971), *enfg.* 185 NLRB No. 25 (1970), *cert. denied*, 404 U.S. 1018 (1972).

We believe it is prudent to emphasize that the evidence here is that the independence of the Vulcan divisions is genuine, and not a mere facade designed for tactical or strategic purposes. A specious intra-corporate arrangement, contrived to take advantage of the protection of the secondary boycott provisions of the Act, obviously would stand on a different footing.

The Board's order will be enforced.

So Ordered.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1167

LOCAL UNION NO. 391, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

CHATTANOOGA DIVISION, VULCAN MATERIALS CO.,

Intervenor.

JUDGMENT

Before: MacKINNON and ROBB, Circuit Judges and CHRISTENSEN,* Senior District Judge for the District of Utah.

THIS CAUSE came on to be heard upon a petition filed by Local Union No. 391, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, to review an order of the National Labor Relations Board issued against said Petitioner, its officers, agents, and representatives on January 21, 1974, and upon a cross-application filed by the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on March 7, 1975, and has considered the briefs and transcript of record filed in this cause. On June 23, 1976, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

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*Sitting by designation pursuant to 28 U.S.C. §294(d).

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the District of Columbia Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that Local Union No. 391, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Greensboro, North Carolina, its officers, agents, and representatives, abide by and perform the directions of the Board in said order contained.

George E. MacKinnon
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

Roger Robb
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

A. Sherman Christensen
United States Senior District Judge for the District of Utah

APPENDIX E

MKP

208 NLRB No. 81

D–7825
Chattanooga, Tenn.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LOCAL UNION NO. 391, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,CHAUFFEURS. WAREHOUSEMEN AND HELPERS OF AMERICA[1]

and

CHATTANOOGA DIVISION, VULCAN MATERIALS COMPANY

Case 10–CC–872

DECISION AND ORDER

On April 12, 1973, Administrative Law Judge Max Rosenberg issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel and Charging Party each filed cross-exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Reations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has de-

1 As amended at the hearing.

D–7825

cided to affirm the rulings, findings,[2] and conclusions of the Administrative Law Judge and to adopt his recommended Order as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relation Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that Respondent, Local Union No. 391, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Greensboro, North Carolina, its officers, agents, and representatives, shall take the action set forth in the said recommended Order, as modified below.

1. In the first sentence of the Administrative Law Judge's recommended Order, change "CW & H of A" to "Chauffeurs, Warehousemen and Helpers of America."

2. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D. C. Jan 21 1974

2 The Administrative Law Judge made certain inadvertent errors in his Decision which are corrected as follows:

1. In sec. III, par. 4, delete the second sentence and substitute therefor the following: "As chronicled above, Vulcan is a New Jersey corporation with its principal offices located in Birmingham, where it engages in the manufacture and marketing of chemicals, secondary metals, and heavy construction materials through a chemicals group, a metals group, and five construction divisions within a construction materials group."

2. In sec. III, par. 5, delete the second and third sentences and substitute therefor the following: "The corporate structure of Vulcan consists of a board of directors and a chairman of the board; an executive committee appointed by the board and a

(continued)

Edward B. Miller, Chairman

Ralph E. Kennedy, Member

John A. Penello, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

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chairman of the executive committee, and two executive vice presidents, one for the chemicals and metals groups and one for the construction materials group. In turn, each division is headed by a divisional president who is responsible to the appropriate executive committee and to the board of directors for the efficient and economic operation of the division, for the general management of the division, and for the control and profits of the division."

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT engage in, induce, or encourage any individual employed by Chattanooga Division, Vulcan Materials Company, to engage in a strike or refusal in the course of such individual's employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, where an object thereof is to force or require Chattanooga Division, Vulcan Materials Company to cease doing business with persons engaged in commerce, or in an industry affecting commerce, or to force or require persons engaged in commerce or an industry affecting commerce to cease doing business with Chattanooga Division, Vulcan Materials Company.

WE WILL NOT threaten, coerce, or restrain Chattanooga Division, Vulcan Materials Company, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof, is to force or require Chattanooga Division, Vulcan Materials Company, to cease doing business with persons engaged in commerce or in an industry affecting commerce, or to force or require persons engaged in commerce or in an industry affecting commerce to cease doing business with Chattanooga Division, Vulcan Materials Company.

LOCAL UNION NO. 391, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, CHAUFFEURS,
WAREHOUSEMEN AND HELPERS OF AMERICA
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

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JD-257-73
Chattanooga, Tenn.
Atlanta, Ga.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D. C.

LOCAL UNION NO. 391, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CW & H OF A

and Case No. 10-CC-872

CHATTANOOGA DIVISION, VULCAN MATERIALS COMPANY

Hutton S. Brandon, Esq. and
Aaron Z. Dixon, Esq., of
Atlanta, Ga., for the
General Counsel.
Hugh J. Beins, Esq.. of Washington,
D. C., for the Respondent.
John J. Coleman, Jr., Esq., of
Birmingham, Ala., and John L.
Lenihan, Esq., of Chattanooga,
Tenn., for the Charging Party.

DECISION

Statement of the Case

MAX ROSENBERG, Administrative Law Judge: With all parties represented, this case was tried before me in Chattanooga, Tennessee, and Atlanta, Georgia, on December 14, 1972 and January 16, 1973, on a complaint filed by the General Counsel of the National Labor Relations Board and an answer interposed thereto by Local Union No. 391, International Brotherhood of Teamsters, CW & H of A, herein

called the Respondent.[1] The issue raised by the pleadings relates to whether Respondent violated Section 8(b)(4)(i)(ii)(B) of the National Labor Relations Act, as amended, by picketing at the premises of Chattanooga division, Vulcan Materials Company, herein called Chattanooga. Briefs have been filed by the General Counsel, Chattanooga, and the Respondent, which have been duly considered.

Upon the entire record made in this proceeding,[2] I hereby make the following:

Findings of Fact and Conclusions

I. The Business of the Employer

Chattanooga maintains an office and place of business in Chattanooga, Tennessee, where it is engaged in the processing and retailing of gravel, asphalt, and ready-mix concrete. During the past calendar year, Chattanooga processed, sold and distributed its products valued in excess of $50,000 directly to customers located outside the State of Tennessee.

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1 The complaint, which issued on November 20, 1972, is based upon charges filed and served on October 24, 1972, and amended charges which were filed and served on November 14, 1972.

2 The record herein, by agreement of all parties, is comprised of the record made in a section 10(1) proceeding before the Honorable Frank W. Wilson, United States District Court Judge for the Eastern District of Tennessee on December 4 and 5, 1972, together with the exhibits introduced therein (exclusive of Respondent's Exhibit No. 32) and the exhibits introduced herein.

The General Counsel's Motion to Correct Transcript of the record made before Judge Wilson is hereby granted.

I also hereby grant Respondent's motion to receive additional exhibits which consist of Respondent's Exhibit No. 60 and purports to be a 1972 Statement of Earnings, and Respondent's Exhibit No. 61, which is a Xerox copy of gasoline credit cards bearing the name of Vulcan Materials Company which were used by an employee of Mideast division of Vulcan.

Mideast division of Vulcan Materials Company, herein called Mideast, has its principal office and place of business in Winston-Salem, North Carolina, where it is engaged in the processing, sale and distribution of crushed stone. During the annual period material to this proceeding, Mideast sold and shipped its products valued in excess of $50,000 directly to customers located outside the State of North Carolina.

Vulcan Materials Company, herein called Vulcan, a New Jersey corporation with its principal office in Birmingham, Alabama, is engaged in the manufacture of chemicals, secondary metals and heavy construction materials. Vulcan is comprised of seven divisions: the Southeast division, the Chattanooga division, the Mid-South division, the Mideast division, the Mid-west division, the Metals division, and the Chemical division.

I find that Mideast and Chattanooga are employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

III. The Alleged Unfair Labor Practices

The General Counsel contends that Respondent violated Section 8(b)(4)(i)(ii)(B) when, in the course of an economic strike called against Mideast, Respondent extended the work stoppage and picket line to the premises of Chattanooga, a neutral employer, thereby inducing and encouraging individuals employed by Chattanooga to cease work, and forcing or requiring Chattanooga to cease doing business with its customers and suppliers, or forcing and requiring Chattanooga's customers and suppliers to cease doing business with it. For its part, Respondent claims that Chattanooga was not a separate "person" to the dispute between Mideast and Respondent, and therefore its picketing at Chattanooga's work situs was legally privileged.

Section 8(b)(4) of the Act makes it an unfair labor practice for unions to (i) induce or encourage individuals employed by any "person" to engage in a strike, or to (ii) to threaten, coerce or restrain any "person," where in either case an object thereof is (B) to force or require any "person" to cease doing business with any other person. Section 2(1) of the Act provides that "the term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers."

The Board has held, with court approval, that separate corporate divisions are separate "persons," and, as such, are entitled to the protection of Section 8(b)(4)(B) from the labor disputes of the other, if neither the division nor the parent exercises actual or active, as opposed to merely potential, control over the everyday operations or labor relations of the other.[3] Thus, whether Respondent's strike against Chattanooga was clothed with legality depends upon whether or not that business entity occupied the status of a "person" within the Statutory scheme.

The facts giving rise to the instant litigation are not in essential dispute and I find them to be as follows. As chronicled above, Vulcan is a New Jersey corporation with its principal offices located in Birmingham, where it engages in the manufacture and marketing of chemicals, secondary metals, and heavy construction materials through a chemicals division, a metals division, and five construction divisions. The chemicals division is headquartered in Wichita, Kansas. The metals division is situated in Sandusky, Ohio. The five construction divisions and their locations are: Chattanooga division - Chattanooga, Tennessee; Mideast division - Winston-Salem, North Carolina; Mid-west division - Chicago, Illinois; Mid-South division - Knoxville, Tennessee; and Southeastern division - Birmingham, Alabama. Each of the construction divisions produces and markets its products in the geographical areas which they serve and does not

3 *Los Angeles Newspaper Guild, Local 69, et al. (San Francisco Examiner, Division of Hearst Corporation,* 185 NLRB No. 25 and cases cited in footnote 5 thereof, *enf'd* 443 F.2d 1173 (C. A. 9).

compete with the other divisions. Mideast, which operates in the States of North Carolina and Virginia, produces crushed stone. Chattanooga, which services the Chattanooga area, produces crushed stone and ready-mixed concrete.

The chief executive officers of Vulcan are located in Birmingham, Alabama. The corporate structure of Vulcan consists of a Chairman, a Board of Directors, an executive committee appointed by the Board, and executive vice presidents who are in charge of the chemicals, metals, and construction divisions. In turn, each division is headed by a divisional president who is elected by the Board of Directors, and who is responsible to the appropriate executive vice president for the efficient and economic operation of the division, for sales and related activities, for the general management of the division, and for the control and profits of the division.

It is undisputed and I find that there is no interchange of employees between the respective divisions of Vulcan, nor is there any interchange of products. While there is some transference of equipment between the construction divisions, such as water pumps and machinery, this interchange is negligible and is handled on the same rental basis as when equipment is loaned to or exchanged with competitors. Each division maintains its own payroll, makes its own disbursements, does its own bookkeeping and accounting, and has its own bank account. Moreover, there is no line of advancement between the various divisions, or between the divisions and Vulcan. Each division president has the sole responsibility for the production and marketing of the division. He alone selects his staff, and he alone hires and discharges personnel. There is no day-to-day communication in the normal sense between the divisions, or between the divisions and Vulcan. Each division president possesses a broad authority to formulate his individual labor relations' policies, to negotiate collective-bargaining agreements, and to execute these contracts. While the divisional president may utilize the services of Vulcan's industrial relations staff in Birmingham, such utilization is not obligatory but optional. Certain services are made available to the divisions by Vulcan. These include such things as pension plans, insurance plans, and savings plans. It is undisputed and I find, however, that these services may be availed of or rejected by any or all divisions.

Turning to the events giving rise to this proceeding, the Respondent commenced an organizational campaign among Mideast's employees in the Spring of 1972[4] and, following a Board-conducted election, was certified as the collective-bargaining representative of a unit of employees at the Central Services Shop of Mideast. The Consent Agreement for this election was signed, on behalf of Mideast, by its local labor counsel, Charles Vance. A collective-bargaining session was thereafter scheduled between the parties for June 21. Prior to this meeting, Louis Graham, president of Mideast, telephoned Carl Whitten, Vulcan's manager of industrial relations, and requested that Whitten participate as a member of Mideast's negotiating team in the forthcoming negotiations. According to Whitten's uncontroverted testimony, Vulcan made his services available to the divisions because "the division may want counsel, guidance or help in their negotiations, and they know that there is a staff at Birmingham, that is available to help them if they want it. They are under no obligation to use it. So, they may invite me in to help them, recommend certain things, but they are free to accept or reject my recommendations." Shortly after their telephone conversation, Jerry Simmons, Mideast's manager of administration, who is responsible for personnel, safety and industrial relations, conducted a wage and economic survey to determine how Mideast compared with the industry.[5] Armed with this information, President Graham formulated Mideast's contract proposals. When the parties met on June 21, Mideast's negotiating team consisted of Whitten, Simmons, and an individual named Bell. At the outset, Whitten informed Respondent's representatives, as he did again at a meeting in July, that "we were decentralized in our management structure; that each division had full responsiblity for their own labor relations, for the profits in the business, for the running of the business, and I was there at the invite of the division, and that my role would be simply to help the division express their particular view,

4 Unless otherwise indicated, all dates hereinafter fall in 1972.

5 Simmons testified without contradiction and I find that he had engaged in negotiations with other labor organizations without assistance.

profits and control of the business, and all of the activities there relating to the local people." Although Whitten acted as Mideast's chief spokesman throughout the negotiations, this was done under specific authority from Graham. The record establishes and I find that Graham made the final decision respecting the content of Mideast's contract proposals and, on occasion, rejected specific recommendations on certain clauses suggested by Whitten.

After several fruitless discussions, the parties reached an economic impasse on August 31.[6] On October 2, the Respondent struck Mideast and commenced picketing the Central Services Shop and storeroom, and the quarry adjacent to the shop in Winston-Salem. On October 20, Respondent began picketing Chattanooga's ready-mix plant with signs bearing the legend "Vulcan Materials Plant on strike–Teamsters Local 391." On October 25, Respondent extended its picketing to Chattanooga's quarry and plant, utilizing identical picket signs. It is undisputed and I find that, at all material times, Respondent represented no employees employed by Chattanooga and had no labor dispute with that entity. In fact, Chattanooga's employees were represented by other unions, including a sister Local 515 of Respondent, and no labor dispute existed between Chattanooga and these other labor organizations. Moreover, at the time of the picketing as well as prior thereto, there was no interchange of products or employees between Mideast

6 Robert Majors, Vulcan's manager of manpower planning and development, visited Mideast's facilities on three occasions during the negotiations and the subsequent strike. On one occasion, he attended the final negotiation session at the invitation of Mideast as an unofficial observer. On the two other occasions, Majors was invited by Jerry Simmons, Mideast's manager of administration, to assist in preparing for the strike and to devise training programs for supervisors.

Majors had also assisted the president of Chattanooga in 1970 in negotiating a contract with Teamsters Local 515 following a lockout that year. Again, Majors was invited by Chattanooga's President Ellman to attend the sessions, and Majors followed Ellman's script in the negotiations. Although Majors signed the resultant contract on behalf of Chattanooga, this was due solely to the fact that Ellman was not available to perform this chore.

and Chattanooga, and Chattanooga had not performed any work for Mideast. Rounding out the narrative, the result of the picketing at Chattanooga had the effect of causing Chattanooga's employees to cease doing any work, thereby completely shutting down the operations at the Chattanooga installations.

As Judge Wilson observed in his decision arising out of the Section 10(l) hearing held before him, the "crux" of the issue presented in this proceeding "centers around the activities of Carl T. Whitten and Robert Majors, members of the Vulcan Home Office Industrial Relations staff, and around the services they rendered to both the Mid-east Division and the Chattanooga Division."[7]

As chronicled above, although Vulcan maintains an industrial relations staff at its Birmingham office the services of which are available to all of its divisions, its members participate in collective-bargaining relations for the divisions by invitation of the divisional president. Even though Vulcan's personnel may be designated as the chairmen of the divisional bargaining teams, the format for the divisions' contractual

7 I am not persuaded by Respondent's argument that, because Vulcan files a single income tax return, trades its stock on the New York Stock Exchange under its corporate name, has settled antitrust suits brought by the Federal Trade Commission against it, contracts for the purchase of real estate with bonds which are handled in its offices, and issues a consolidated annual report to stockholders, this establishes that Chattanooga was not a "separate person" who was not "wholly unconcerned" with the labor dispute which flaired up at Mideast. Nor am I convinced that this argument is supported by the facts that Vulcan projects its public image under the corporate name of "Vulcan Materials Company" on billboards at the Mideast and Chattanooga sites, that the trucks at Mideast and Chattanooga bear only the name of "Vulcan Materials Company," that truckdrivers receive the same safety instructions in the divisions and are awarded the same safety pins which bear only the Vulcan legend, or, that personnel at Mideast and Chattanooga obtain insurance and pension plans from Vulcan's office. As indicated heretofore, these benefits are available to the divisions on an optional basis. In addition, the name of Mideast also appears on signs in Winston-Salem. Moreover, employee paychecks also bear the legend of Mideast.

proposals are drafted by the divisional industrial relations' departments under the aegis of the divisional presidents. These presidents possess the authority to, and have in fact, rejected proposals formulated by Whitten and Majors when their assistance was sought in negotiations. In short, although Mideast and Chattanooga availed themselves of the services of Vulcan's Whitten and Majors, I am convinced and find that they served simply in an advisory capacity during bargaining sessions, with final authority regarding management proposals residing in the presidents of the Chattanooga and Mideast divisions. I therefore find that Vulcan did not exercise a centralized control of the labor relations of its divisions.

The facts in the instant case parallel those considered by the Board in *Los Angeles Newspaper Guild, Local 69 et al. (San Francisco Examiner, Division of Hearst Corporation)*,[8] where it held that two divisions of the same corporate enterprise were entitled to the same protection under Section 8(b)(4) from each other's labor controversies as that accorded to corporate subsidiaries, provided that the corporation did not exercise actual, or active, control over the divisions which operated independently of the corporation and each other as separate autonomous entities. In that case, the Hearst Corporation, incorporated in Delaware, engaged in a conglomerate of business activities conducted through some 20 divisions, of which 7 were newspapers. With respect to the two divisions involved, the president of Hearst appointed their heads and delegated to them the responsibility for the day-to-day operations, including the formulation and implementation of labor relations policies. Hearst retained the power to remove the divisional officers in the event of unfavorable earnings. Each division manager possessed the authority to determine the size and salaries of the staff which he hired, discharged, or promoted. As in the instant proceeding, there was no transfer of employees among the divisions and, although Hearst made available to the divisions certain insurance, pension and salary-continuation programs, each

8 185 NLRB No. 25, *enf'd* 443 F.2d 1173 (C. A. 9). See also *American Federation of Television and Radio Artists, Washington-Baltimore Local (Baltimore News American Division, the Hearst Corporation)*, 185 NLRB No. 26, *enf'd* ---- F.2d (C. A. D. C.).

division could accept such programs or reject them. And, as in the instant case, each of the Hearst divisions' managers had final authority to market its product. Moreover, each division maintained its own financial system, subject to uniform reporting requirements for tax purposes. The division retained certain operating profits as a cash balance and remitted the surplus to Hearst. Although corporate approval was required for expenditures in excess of $10,000, such approval had never been withheld.[9] Viewing these facts, the Board concluded that two of Hearst's divisions which were not involved in a labor dispute affecting a third division, which was being struck, constituted "persons" within the meaning of Section 8(b)(4)(B) because they were virtually separate and autonomous enterprises in Hearst's corporate scheme of things. The Board therefore found that the striking unions violated Section 8(b)(4)(i)(ii)(B) by extending their dispute to the divisions which were neutrals to the dispute.

I have heretofore found that Vulcan did not maintain actual or active control of the labor relations policies of either Chattanooga or Mideast. I therefore conclude that, on the facts here presented, Chattanooga was an unoffending employer and a Statutory "person" during the course of Respondent's dispute with Mideast. Accordingly, I conclude that, by picketing Chattanooga on and after October 20, Respondent violated Section 8(b)(4)(i)(ii)(B) of the Act.[10]

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9 Mideast and Chattanooga are allowed to expend up to $50,000 without Vulcan's prior approval.

10 In his brief, counsel for the Respondent moved, in effect, to dismiss the complaint on the grounds that the General Counsel failed adequately to investigate the charges filed herein before issuing the complaint, and that Vulcan "deliberately and contumaciously" suppressed documentary evidence which would allegedly have been favorable to Respondent's cause. Judge Wilson, in the Section 10(1) proceeding, found no merit in these contentions, and neither do I. I shall therefore deny the motion.

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of Chattanooga described in section I, above, have a close and intimate relationship to trade, traffic, and commerce among the several States, and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

V. The Remedy

Having found that Respondent has engaged in unfair labor practices within the meaning of Section 8(b)(4)(i)(ii)(B) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact and conclusions, and the entire record made in the case, I hereby make the following:

Conclusions of Law

1. Respondent is a labor organization within the meaning of Section 2(5) of the Act.

2. Chattanooga is an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act.

3. Chattanooga is a "person" within the meaning of Section 2(1) and Section 8(b)(4) of the Act.

4. By picketing the premises of Chattanooga, with which it had no labor dispute, the Respondent has engaged in, and has induced and encouraged individuals employed by Chattanooga to engage in, a strike or refusal to perform services, and has threatened, coerced and restrained Chattanooga with an object in each case of forcing or requiring Chattanooga to cease doing business with persons engaged in commerce or in an industry affecting commerce, and forcing or requiring persons engaged in commerce or in an industry affecting

commerce to cease doing business with Chattanooga, and has thereby violated Section 8(b)(4)(i)(ii)(B) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact and conclusions of law, and the entire record, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, I hereby issue the following recommended:

ORDER[11]

Respondent, Local Union No. 391, International Brotherhood of Teamsters, CW & H of A, its officers, representatives, and agents, shall:

1. Cease and desist from:

(a) Inducing or encouraging any individual employed by Chattanooga Division, Vulcan Materials Company, or any other person engaged in commerce or in an industry affecting commerce, to engage in a strike or a refusal in the course of his employment to use, manufacture, process, transport or otherwise handle or work on goods, articles, materials, or commodities, or to perform any services, where an object thereof is to force or require Chattanooga Division, Vulcan Materials Company to cease doing business with persons engaged in commerce or in an industry affecting commerce, or to force or require persons engaged in commerce or in an industry affecting commerce to cease doing business with Chattanooga Division, Vulcan Materials Company.

11 In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

(b) Threatening, coercing, or restraining Chattanooga Division, Vulcan Materials Company, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require Chattanooga Division, Vulcan Materials Company, to cease doing business with persons engaged in commerce or in an industry affecting commerce, or to force or require persons engaged in commerce or in an industry affecting commerce to cease doing business with Chattanooga Division, Vulcan Materials Company.

2. Take the following affirmative action which I find is necessary to effectuate the policies of the Act.

(a) Post at its offices and meeting halls copies of the attached notice marked "Appendix."[12] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by its authorized representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for at least 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Furnish said Regional Director with signed copies of the aforesaid notice for posting by Chattanooga Division, Vulcan Materials Company, if willing, at places where it customarily posts notices to its employees.

(c) Notify said Regional Director, in writing, within 20 days from the date of receipt of this Decision, what steps Respondent has taken to comply herewith.

12 In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated at Washington, D. C.

/s/Max Rosenberg
Max Rosenberg
Administrative Law Judge

FORM NLRB-4728
(4-71)

APPENDIX JD-257-73

NOTICE TO MEMBERS

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT engage in, or induce or encourage any individual employed by CHATTANOOGA DIVISION, VULCAN MATERIALS COMPANY, to engage in a strike or refusal in the course of such individual's employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities, or to perform any services, where an object thereof is to force or require CHATTANOOGA DIVISION, VULCAN MATERIALS COMPANY to cease doing business with persons engaged in commerce, or in an industry affecting commerce, or to force or require persons engaged in commerce or an industry affecting commerce to cease doing business with CHATTANOOGA DIVISION, VULCAN MATERIALS COMPANY.

WE WILL NOT threaten, coerce or restrain CHATTANOOGA DIVISION, VULCAN MATERIALS COMPANY, or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require CHATTANOOGA DIVISION, VULCAN MATERIALS COMPANY, to cease doing business with persons engaged in commerce or in an industry affecting commerce, or to force or require persons engaged in commerce or in an industry affecting commerce to cease doing business with CHATTANOOGA DIVISION, VULCAN MATERIALS COMPANY.

LOCAL UNION NO. 391, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CW & H of A
(Labor Organization)

Dated _____ By _____
(Representative) (Title)

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